



April 18, 2023

Lina M. Khan
Chair
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, DC 20580

RE: Non-Compete Clause Rulemaking Matter No. P201200

Dear Chair Khan:

On behalf of the more than 80,000 members of the American College of Surgeons (ACS), we appreciate the opportunity to submit comments to the Federal Trade Commission's (FTC) Non-Compete Clause proposed rule published in the *Federal Register* on January 19, 2023.

The ACS is a scientific and educational association of surgeons founded in 1913 to improve the quality of care for the surgical patient by setting high standards for surgical education and practice. According to our recent membership survey, approximately 75 percent of our members are employed, and the overwhelming majority of these employed surgeons have a non-compete clause included in their employment contract. As such, we have a vested interest in this proposed rule and its potential impact on surgeons, surgical patients, and the delivery of surgical care.

Preliminary Finding of "Unfair" Method of Competition

The Commission preliminarily finds that non-compete clauses are an unfair method of competition under Section 5 of the Federal Trade Commission Act in three independent ways:

1. Non-compete clauses are restrictive conduct that negatively affect competitive conditions.
2. Non-compete clauses are exploitative and coercive at the time of contracting while burdening a not insignificant volume of commerce.
3. Non-compete clauses are exploitative and coercive at the time of the worker's potential departure from the employer while burdening not an insignificant volume of commerce.

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The ACS agrees with these preliminary findings and with many of the Commission’s rationales for its assertions. We believe that these preliminary findings should be applied to physician employment agreements and that non-compete clauses should be banned from physician contracts. Specifically, ***ACS requests that the FTC non-compete ban apply to physician contracts in the same manner as it would to other employment contracts covered by the final rule.*** We provide comment in this letter on the Commission’s findings, but first we discuss the impact of non-compete clauses on patient care.

Impact on Patient Care

In addition to the detrimental aspects of non-compete clauses addressed in the rule, an important aspect for surgeons is the impact non-compete clauses have on patient care. Surgeons being forced to leave an area for an employment opportunity due to a non-compete clause may result in patients needing to change surgeons to continue and complete their care. Continuity is essential, especially in situations where the first surgeon has not completed the course of care. Patients often require multiple surgical procedures in separate episodes of care for both simple and complex surgical conditions. The patient’s best interest is always better served by involvement of the initial surgeon, or at a minimum their involvement and consultation.

Non-compete clauses may also prevent a surgeon from establishing their own practice in a location to provide more choice to local patients and/or improve patient experience by reducing long wait times. Surgeons’ inability to open their own practices also potentially facilitates increased consolidation of healthcare delivery systems, which has been shown to lead to higher healthcare costs and reduced patient choice.

From the employer perspective, non-compete clauses make it more difficult for employers to compete for workers. This could hurt patient care because the healthcare institution might not have access to the best surgeons they could afford, to the detriment of patients, because those surgeons are bound by non-compete clauses at another institution. The market should support healthy competition for surgeons providing high-quality care, creating even greater ability for surgeons to engage in quality improvement activities. Yet employers imposing and enforcing non-compete clauses are undervaluing what is a key mission of the ACS and what should be a critical societal goal (i.e., increased access to quality health care) that federal law and regulation should support.

The ACS is also particularly concerned that non-compete clauses will exacerbate the existing maldistribution of surgeons, resulting in worsening patient access to quality health care. A 2019 study by the Health Resources and Services Administration found that:

- there were only enough general surgeons to meet 69 percent of the demand for care in rural areas;

- there were only enough general surgeons to meet 75 percent of the demand for care in suburban areas; and
- there were 19 percent more surgeons than required to meet the demands for care in urban areas.¹

This report found that, projecting forward, the maldistribution issue will continue until at least 2030. Accordingly, non-compete clauses that limit the ability of surgeons to move to different locations will have an impact on patient care by limiting the number of surgeons potentially able to move to serve patients in rural and suburban areas. It is well known that facilities in rural and other underserved areas often rely on financial incentives to attract surgeons. However, non-compete clauses often serve to prevent institutions in rural and other underserved urban and suburban areas from attracting surgeons.

Non-Compete Clauses are Restrictive Conduct that Negatively Affects Competitive Conditions

The Commission preliminarily finds non-compete clauses are an unfair method of competition under Section 5 because they are restrictive conduct that negatively affects competitive conditions. The rule states that in a well-functioning labor market, a worker who is seeking a better job – more pay, better working conditions, more enjoyable work – can enter the labor market by looking for work. But if a worker is bound by a non-compete clause, and the worker seeks other employment, the non-compete clause will prevent the worker from accepting a new job within the scope of the non-compete clause. As a result, where non-compete clauses are prevalent in a market, workers are more likely to remain in jobs that are less optimal with respect to the worker’s ability to maximize their productive capacity.

Impact on surgeons

Non-complete clauses enable employers to either bind surgeons to their current location or force the surgeon to move to a distant location. Such clauses prevent surgeons from being able to consider other positions that might be more desirable, either from a pay or work environment perspective. We have heard from our members that many surgeons bound by non-compete clauses feel trapped because a new job would require moving their family to a new location outside the area of geographic restriction. If both wage earners in a working household are bound by non-compete clauses, the ability to search for a better working environment or salary is nearly impossible.

These restrictions can add to existing feelings of burnout that many surgeons experience. A non-compete clause that prevents a surgeon from joining another practice within a specified distance from the surgeon’s current healthcare system could result in even

¹ Health Resources and Services Administration. *Report to the Senate Committee on Appropriations*. Washington, DC: U.S. Department of Health and Human Services; 2019.

broader geographic restrictions given that systems can have many locations in different cities and states.

Non-compete clauses can be particularly burdensome for subspecialists because a specific population center might only have one surgeon with a particular subspecialty. The inability to move to another hospital or set up their own practice could result in the geographic population losing a subspecialty when the surgeon is forced to move out of area.

Impact on employers

The rule also states that just as employers compete for workers in a well-functioning labor market, workers compete for jobs, and in general, the more workers who are available, the stronger the match the employer will find. We agree with this view and would assert that surgeons should be able to move to the centers that can best utilize them. For example, if a hospital seeks to establish a new trauma center, we believe the facility should be able to hire the best trauma surgeons available regardless of where they most recently worked. This same argument applies broadly to any new service line a facility wishes to establish, be it a specialized center for endoscopy, cancer, or complex gastrointestinal surgery. Enabling employers to have access to the best surgeons available to them will lead to the formation of better care delivery models that benefit patients, the community, and their whole system.

Non-Compete Clauses are Exploitative and Coercive at the Time of Contracting and at the Time of the Worker's Potential Departure from the Employer

The ACS disagrees with some of the Commissions assumptions regarding its proposed justifications for establishing a double standard for non-competes that excludes those who are either highly trained or earn above a certain income threshold. One of the rationales provided in the proposed rule for excluding those who are either highly trained or above an income threshold is the assumption that those individuals will obtain legal advice prior to signing the contract and can thereby avoid some of the negative implications of non-compete clauses.

In the case of those just entering the surgical workforce from their residency training, this is not a valid assumption. Surgeons enter the workforce today with many tens, perhaps hundreds, of thousands of dollars of debt. Because of the time and income deferral for a minimum of five years of graduate medical education training, they are increasingly concerned and anxious about the repayment of that debt. This both facilitates and enhances the imbalance in bargaining power already inherent between a young professional and the corporate healthcare entity seeking to employ them. Despite the advice and urging of their faculty mentors, many trainees do not engage the services of legal counsel prior to signing an employment agreement. This allows seasoned employers

to take advantage of the lack of contract negotiating skills among new surgeons, locking these new surgeons into restrictive contract provisions.

Subsequently, a non-compete clause may preclude a young surgeon from exiting what is later found to be an untenable situation for either professional or personal reasons. In addition, they can be precluded from seeking other opportunities that would provide them with the greater financial means to retire their debt more effectively. This is not only coercive, but also anticompetitive, for both the young surgeon and the institution seeking to employ them. In addition, it also arguably perpetuates the maldistribution of surgeons discussed previously.

We also seek to highlight that we believe nothing in the FTC's proposed rule would prohibit employers from utilizing legitimate recruitment and retention mechanisms. The ACS believes that these instruments can exist as a bilateral agreement between parties and are supportive of our general principles because they preserve, rather than undermine competition for these important societal services.

Single National Standard

As previously stated, data from the ACS' recent membership survey indicate that approximately 75 percent of our members are employed. It is also well known to the FTC that the consolidation in our healthcare sector of our economy is ever increasing, dramatic, and pervasive. Many of the healthcare entities employing our members have facilities in multiple states and may have designated their corporate home in yet a different state. This provides options for these corporate healthcare entities to choose among several states for terms in a non-compete clause most advantageous to them. Thus, the ACS agrees with the Commission's efforts to establish a national standard that would thwart such behavior.

However, the ACS would re-emphasize its previous assertions that there should be a single standard for all income and training levels. Despite, and perhaps because of, what states have traditionally done in establishing their own common law contract standards for non-compete clauses, the ACS believes that legal policy concerns and basic fairness should dictate that the Commission not only finalize a rule that abolishes non-compete clauses but that it does so for all workers regardless of training or income level.

State Law

The rule states that non-compete clauses may be enforced in 47 states, but variation exists with respect to the enforceability of non-compete clauses. The question of which state's law applies in a legal dispute between an employer and a worker can determine the outcome of a case. There is also significant variation in how courts apply choice of law rules in disputes over non-compete clauses.

Given the considerable uncertainty employers and workers face as to whether a particular non-compete clause may be enforced, we urge the Commission to clarify circumstances under which state law would apply and circumstances under which federal law would apply by specifying that state law applies unless the federal law offers stronger protections for workers.

The ACS appreciates the opportunity to provide feedback on this proposed rule and looks forward to continuing dialogue with the FTC on these important issues. If you have any questions about our comments, please contact Vinita Mujumdar, Chief of Regulatory Affairs, at vmujumdar@facs.org.

Sincerely,



Patricia L. Turner, MD, MBA, FACS
Executive Director and CEO